FILE COPY

FILED
OCT 24 1958
JAMES R. BROWNING, Clerk

No. 408

In the Supreme Court of the United States

OCTOBER TERM, 1958

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

VICTOR R. HANSEN,
Assistant Attorney General,

HENRY GELLER,
Attorney,
Department of Justice,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	3
Argument	4
Conclusion	7
Appendix	8

CITATIONS

Cases:

Johnson v. *Maryland*, 254 U.S. 51	6
Penn Dairies v. *Milk Control Commission*, 318 U.S. 261	5, 6
Public Utilities Commission of California v. *United States*, 355 U.S. 534	2, 4, 6

Statutes and regulations:

Armed Services procurement provisions, 70A Stat. 127 (10 U.S.C. 2301, *et seq.*)	4, 8
Armed Service Procurement Regulations, 32 C.F.R.I. 108, *et seq.* (1957)	6, 9
California Public Utilities Code:	
Section 21	6
Section 2112	6
Pennsylvania Public Utility Law of May 28, 1937, P.L. 1053, 66 P.S. § 1101, *et seq.*:	
Section 303	3, 4, 5
Section 304	3, 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 408

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (Pet. App. A., pp. 25-32) is reported at 393 Pa. 537. The opinion of the Superior Court of Pennsylvania (Pet. App. B, pp. 33-48) is reported at 184 Pa. Superior Ct. 380. The original order of the Pennsylvania Public Utility Commission (Pet. App. C., pp. 49-53) is reported at 32 Pa. P.U.C. 428. The order on remand from the Superior Court (Pet. App. D., pp. 54-57) has not been officially reported.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on June 30, 1958. The petition for a writ of certiorari was filed on September 27, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the Supreme Court of Pennsylvania acted correctly in setting aside, on the authority of this Court's decision in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, orders of the Pennsylvania Public Utility Commission forbidding special or negotiated arrangements between common carriers and the United States to transport property for the United States at rates other than provided in the carrier's tariffs filed with the Commission.

STATUTES AND REGULATIONS INVOLVED

The pertinent sections of the Pennsylvania Public Utility Law of May 28, 1937, P.L. 1053, 66 P.S. §1101, *et seq.*, and Rules 2 and 6 of petitioner's tariff regulations for carriers are set forth respectively in Appendix E and Appendix F to the petition, pp. 58-65. The pertinent Armed Service Procurement provisions, 70A Stat. 127-133 (10 U.S.C. 2301, *et seq.*); and pertinent provisions of Defense Department, Army, Navy, and Air Force Regulations are set forth in the Appendix, *infra*, pp. 8-20.

STATEMENT

In the fall of 1953 the Pennsylvania Railroad quoted a "special" rate to the United States for the carriage of certain Air Force material from an airbase in Pennsylvania to a warehouse in that State (Pet. App. A, p. 26). This special rate was lower than the regular tariff rate, on file with the Pennsylvania Public Utility Commission (Commission), for commercial shipments of the nature involved. After investigation and hearings, the Commission determined that the railroad's action contravened Sections 303 and 304 of the Public Utility Law of Pennsylvania (Pet. App. E, pp. 58-60), which prohibit carriers from transporting property for "any person, corporation or municipal corporation" at a rate other than that specified in the tariffs filed with the Commission, or granting "any unreasonable preference or advantage".

Upon appeal to the Superior Court of Pennsylvania, the United States urged that it was not a "person, corporation or municipal corporation" within the meaning of Sections 303 and 304 and that these provisions, if applicable to the United States, are an unconstitutional interference with federal functions (Pet. App. A, pp. 26-28). The Superior Court rejected both these contentions and affirmed the Commission's orders (Pet. App. B., pp. 33-48). Upon further review, the Supreme Court of Pennsylvania reversed (Pet. App. A., pp. 25-32). It found it unnecessary to decide the question whether the United States came within the purview of Sections 303 and

304, because, it held, *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (herein referred to as the *California Commission* case), which came down after the decision of the Superior Court, "controls the instant case" and required reversal of the Superior Court's judgment (Pet. App. A., pp. 27, 28-9).

ARGUMENT

In the *California Commission* case, *supra*, this Court found that "numerous and extensive" regulations, promulgated to carry out the provisions of the Armed Forces Procurement Act (App., *infra*, pp. 9-20) and having "the force of law", "sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken." 355 U.S. at 542-543. The California statute would have permitted "this discretion of the federal officers [to] be exercised and reduced rates used only if [its] Commission approves". 355 U.S. at 543. In these circumstances, this Court found a clear conflict between national law and state law, and that under the supremacy clause of Article VI of the Constitution, the former must prevail.

The conflict in the instant case is even more direct. For Pennsylvania law (assuming its applicability to the United States) completely forbids federal officers from discharging their functions under the noted regulations. Under Sections 303 and 304, they cannot negotiate for rates below "applicable current rates" but must adhere to the existing rates. The

absence of discretionary authority to permit negotiation for reduced rates, far from being a distinguishing point as petitioner claims (Pet. 13-14), makes this a stronger case for the application of the principle enunciated in *California Commission*.[1]

Petitioner, relying on *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261, also seeks (Pet. pp. 14-18) to distinguish *California Commission* upon the ground that the impact of Pennsylvania's regulation falls not on the United States but on the carrier. But this same argument was rejected by this Court in *California Commission*, where it was pointed out that, of necessity, the State was placing a prohibition on the Federal officers because of "the conflict between the federal policy of negotiated rates and the state policy

---

[1] Petitioner's contention (Pet. 18-19) that the Commission does not require discontinuance of special or reduced rates but only a mere filing of the requisite tariffs, misstates the issue. The United States claims the right to negotiate for rates below those on file with the Commission, which right the Commission and Superior Court have denied on the basis of Sections 303 and 304. Thus, in the instant case, the Supreme Court of Pennsylvania stressed that the United States had obtained a "*special rate* * * * *lower than the regular tariff rate* published by the Railroad * * *" (Pet. App. A, p. 26). It is no answer to say that the carrier could grant such special rates, if it would continually change its existing rates (which are applicable to all shipments) to each new special rate negotiated by the United States. Even assuming such continual changes were a practical possibility, there would be a serious interference with federal functions in view of the fact that, if state law is controlling, the United States could obtain only such negotiated lower rates as the carrier was willing to convert into rates applicable to all shippers. Such state-imposed restriction would bar effective negotiation of rates lower than existing published rates.

of regulation of negotiated rates" (355 U.S. at p. 544).[2]

Petitioner's final argument (Pet. 19-22) that the decision below, if allowed to stand, will violate state and national transportation policy is similarly without merit. State policy must yield to federal law in the event of conflict. *California Commission*, 355 U.S. at p. 544, and cases cited. The applicable regulations place the duty on the federal transportation officers to "be guided by and pursue policies which will not contravene the National Transportation Policy * * *" (A.R. 55-8, par. 2, App., *infra*, pp. 11-12). See, also, A.R. 55-105, par. 4(a)(1), App., *infra*, pp. 10-11; A.F.M. 75-1, par. 30101(b), (c)(1), App., *infra*, pp. 16-17. As stated by Mr. Justice Holmes in *Johnson* v. *Maryland*, 254 U.S. 51, 57, "that duty it must be presumed has been [and will be] performed."

---

[2] In both California and Pennsylvania, the statutory prohibition, in terms, was addressed to the carrier. Petitioner asserts (Pet. 15) that under the California code (Section 2112, California Public Utilities Code) penalties for violation apply to the shipper as well as the carrier. This is true, but it was not relied upon by this Court in distinguishing *Penn Dairies* (compare 355 U.S. at p. 538 with 355 U.S. at pp. 543-44). For, clearly, if this were the sole ground for conflict between the California statutory scheme and the national law, the Court would have set aside the application to the United States of that particular code section only (i.e., Section 2112). See Section 21, California Public Utilities Code (providing that if any provision is declared invalid, the other provisions shall not be affected thereby); Appellant's Br. in case No. 23, Oct. Term, 1957, pp. 152-3.

CONCLUSION

The decision below is correct, and no question warranting further review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

HENRY GELLER,
Attorney.

OCTOBER, 1958.

APPENDIX

FEDERAL STATUTORY PROVISIONS

1. The pertinent Armed Services procurement provisions, 10, U. S. C. 2301, *et seq.* (70A Stat. 127-133), are as follows:

§ 2304. Purchases and contracts: formal advertising; exceptions

(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—

* * * * *

(2) the public exigency will not permit the delay incident to advertising;

* * * * *

(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;

* * * * *

(12) the purchase or contract is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components;

* * * * *

§ 2305. Formal advertisements for bids; time; opening; award, rejection

* * * * *

(b) * * Awards shall be made with reasonable promptness by giving written notice to that

responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

* * * *

2. The provisions authorizing the Defense heads to prescribe regulations are as follows:

10 U. S. C. 3012 (g):

> The Secretary [of the Army] may prescribe regulations to carry out his functions, powers, and duties under this title.

10 U. S. C. 6011:

> United States Navy Regulations shall be issued by the Secretary of the Navy with the approval of the President.

10 U. S. C. 8012 (f):

> The Secretary [of the Air Force] may preseribe regulations to carry out his functions, powers, and duties under this title.

FEDERAL REGULATIONS

1. The pertinent provisions of the Armed Services Procurement Regulations, 32 C.F.R. 1.108, *et seq.* (1957), are as follows:

> § 1.306-7 *Scheduling of deliveries to permit consolidation of shipments.* The accumulation of small shipments into carload or truckload lots will result in lower transportation costs. Also, the accumulation of small shipments into less

than load shipments may also result in lower transportation costs. * * *

§ 1.306-9 *Rates.* Generally, carriers are required by both Federal and State laws to charge all shippers equally for like services rendered. However, when Government traffic possesses more favorable transportation characteristics (greater volume, heavier loading, less likelihood of damage, etc.) than commercial traffic between the same origins and destinations, freight rates are often lower for the Government traffic. Rate information shall be obtained from the appropriate military traffic management office.

§ 1.306-10 *Volume shipments.* Procurement involving volume shipments (as defined in Departmental instructions), shall be referred at the earliest practicable time to the appropriate military traffic management office for a determination of the reasonableness of applicable current rates and, when appropriate, for negotiation of adjusted or modified rates.

2. The pertinent Army Regulations are as follows:

(a) A. R. 55-105. *Transportation by Commercial Means; General.*

4. ROUTING, GENERAL—a. *General.*

(1) A transportation officer furnishing transportation will familiarize himself with traffic conditions out of his installation in order that property and passengers may be forwarded by the least costly mode, having in mind safety, expedition, equipment supply, procurement regulations, military necessity, and the national transportation policy (enacted in the Transportation Act of 1940 and set forth in the preamble to the

Interstate Commerce Act), and subject to special instructions or required approvals by the Chief of Transportation. * * * *

(b) A. R. 55-142. *Routing of Domestic Freight Traffic.*

* * * * *

2. GENERAL POLICIES. a. The least costly means of transportation will be selected which will meet military requirements and still be consistent with governing procurement regulations and transportation policies as expressed by Congress, contingent upon carrier ability to provide safe, adequate, and efficient transportation. However, if a prior factual determination has been made that expedited delivery will result in greater overall economies through a reduction of intransit or stored supplies, a more costly means of transportation may be employed if necessary to effect the expedited delivery.

(c) A. R. 55-8. *General Transportation and Traffic Management Policies.*

* * * * *

2. ADHERENCE TO NATIONAL TRANSPORTATION POLICY. a. In the employment of Army transportation resources and in the procurement of commercial transportation, responsible officials in the Army Establishment will be guided by and pursue policies which will not contravene the National Transportation Policy (enacted by Congress in the Transportation Act of 1940 and set forth in the preamble to the Interstate Commerce Act) and the Declaration of Policy by Congress to the Civil Aeronautics Authority (as

contained in Section II of the Civil Aeronautics Act of 1938). These policies are reproduced in the appendix and may be referred to by the general term "National Transportation Policy."

(d) A. R. 55-27. *Appearance Before Transportation Regulatory Bodies.*

1. PURPOSE AND SCOPE. a. These regulations implement uniform military policy regarding participation by representatives of the Department of the Army in proceedings before transportation regulatory bodies and outline the procedure to be followed with respect to Army support of carrier applications for new or additional operating authorities. Provisions apply to proceedings involving transportation (except international air route applications) to, from, or between points in the United States or the District of Columbia.

b. The uniform military policy and the procedural principles governing actions in connection with expansion of operating authorities also apply within the Army Establishment to appearances before transportation regulatory bodies in connection with discontinuance or abandonment of operating authorities and discontinuance of transportation service by commercial carriers.

* * * *

(e) A. R. 380-5. *Safeguarding Defense Information.*

* * * *

6. BASIC SAFEGUARDS. Classified information must be safeguarded from compromise. This is accomplished primarily by the following:

* * * *

b. Limiting access to those who "need-to-know."

* * * *

40. NEED TO KNOW. a. No person is entitled to knowledge or possession of classified defense information solely by virtue of his rank, office, position, or security clearance. Such matter will be entrusted only to individuals whose official duties require knowledge or possession and who have been properly cleared. Responsibility for determining whether a person's official duties require that he have access to any item or classified defense information rests upon each individual who has possession, knowledge, or command control of the information involved and not upon the prospective recipient. These principles are equally applicable if the prospective recipient is an organizational entity, including commands, other Federal agencies, or a foreign government.

* * * *

(f) A. R. 380-55. *Safeguarding Defense Information in Movement of Persons and Things.*

* * * *

5. GENERAL. a. The provisions of this section apply to the classification of movement information.

b. Movement information is normally unclassified and may only be assigned appropriate defense classifications under the provisions of sections II and III, AR 380-5, when unauthorized disclosure COULD RESULT IN EXCEPTIONALLY GRAVE OR SERIOUS DAMAGE TO THE NATION OR COULD BE PREJUDICIAL

TO THE DEFENSE INTERESTS OF THE NATION.

c. Movement information including, but not limited to, any of the following elements will be classified CONFIDENTIAL or higher when the classification criteria of *b* above, require—

(1) Information within the scope of paragraphs 14, 28, and 29a, AR 380-5.

(2) Missions of individuals, groups, units, organizations.

(3) Locations of persons, places, or things.

(4) Actual or estimated dates or times of arrival or departure.

(5) Personnel strengths and identification of persons, groups, units, organizations, or things.

(6) Routings or persons or things.

* * * *

(g) Army Procurement Procedure 30-204.5, Utility Service Contracts, March 12, 1957.

a. ARMY POWER PROCUREMENT OFFICER. The Chief of Engineers, acting for the Secretary of the Army, is the Department of the Army Power Procurement Officer. The Army Power Procurement Officer is responsible for the administration of the purchase and sale of utilities services, and for policies, engineering, rate and legal sufficiency in connection with all utilities services transactions and contracts relating thereto in which the Department of the Army has a monetary interest. * * *

3. The pertinent Navy Regulations are as follows:

(a) Navy Shipping Guide, Part I, art. 1800 (d) (3) (20):

(d) DELEGATION OF CONTROL TO NAVY CENTRAL FREIGHT CONTROL OFFICES.—

* * * *

(3) OTHER DUTIES.—Other duties of the Navy central freight control offices are to:

* * * *

20. advise the Bureau of Supplies and Accounts regarding impending freight movements when applicable freight rates appear excessive and, in the opinion of the Navy central freight control office, may be negotiated for more equitable rates.

(b) Navy Shipping Guide, Part I, art. 1800 (e) (4). (3):

(e) DESIGNATION AND RESPONSIBILITY OF SHIPPING OFFICERS.—

* * * *

(4) RESPONSIBILITIES.—Shipping officers are responsible for the following:

* * * *

3. to exercise sound traffic management procedures and to forward all shipments at the most economical over-all cost to the Government consistent with delivery requirements; * * *

(c) Navy Shipping Guide, Part I, art. 1845 (2) (a) (1):

2. SELECTION OF THE MEANS OF TRANSPORTATION.

(a) Policy.—

(1) *General.*—The basic policy in selecting the means of transportation and the choice of method, that is, rail freight, rail express, water carriers, motor carriers, parcel post, air carriers,

etc., is to employ that which will effect delivery of the material at final destination on or before the required time at the lowest over-all total cost to the Government. * * *

(d) Bureau of Yards and Docks Manual, Ch. 11, ¶11B1.05:

It is the policy of the Bureau of Yards and Docks to provide utility services at activities of the Shore Establishment under terms and conditions that will achieve optimum economy for the Government, and are consistent with requirements, efficiency of operation, adequacy and reliability of service, health, and sanitation.

4. The pertinent Air Force Regulations, found in AFM 75-1, Part three, Transportation Policies and Selection of Mode of Transportation, are as follows:

(a) AFM 75-1, Ch. 1 (General) ¶30101 (b), (c) (1):

§ 30101. GENERAL TRANSPORTATION AND TRAFFIC MANAGEMENT POLICIES.—

* * * *

b. *General.* In the employment of its own transportation resources and in the procurement of commercial transportation, the Department of the Air Force will be guided by and pursue policies which will not contravene the National Transportation Policy enacted by Congress in the Transportation Act of 1940 and the Declaration of Policy by Congress to the Civil Aeronautics Authority, as contained in Section II of the Civil Aeronautics Act of 1938. These policies are cited in Appendices H and I for the guidance of all in connection with any reference thereto

in Department of the Air Force transportation and traffic management procedures.

c. *Policies:*

(1) The economic resources of the Department of the Air Force inherent in its large procurement of commercial transportation will not be employed in such a manner as will adversely affect the economic well-being of the commercial transportation industry.

* * * *

(b) AFM 75-1, Ch. 1, ¶30102:

§30102. SELECTION OF MODE OF TRANSPORTATION.—

Selecting the mode of transportation to be used in shipping property and routing within the mode selected is a phase of traffic management which must be considered frequently in daily operations. In determining the mode of transportation to be utilized, the following factors will be considered:

a. The least costly means will be selected, having in mind safety, expedition, equipment supply, procurement regulations and security considerations.

b. Consideration will be given to the possibility of rate negotiations (tariffs, schedules, or Section 22 agreements). Before this can be done it is necessary to have certain information available.

(1) What is to be shipped and how it should be described on the bill of lading.

(2) Consignee and destination.

(3) Overall cost of shipping via different modes.

(4) Types of service afforded by various modes of transportation.

(5) Need for expedited service; routes specified in tariffs; clearances; and the type of service afforded by specific carriers within a mode.

(6) Security classication.

(c) AFM 75-1, Ch. 1, ¶30107:

30107. TRANSPORTATION AND INCIDENTAL COSTS—

In selecting the means of transportation and the choice of method, that is, rail freight, rail express, water carrier, motor carrier, parcel post, air carriers, etc., it is basic policy to employ that which will effect delivery at final destination on or before the required time at the lowest overall total cost to the Government. * * *

(d) AFM 75-1, Ch. 2 (Consolidating Shipments at the Military Installation), ¶30201:

30201. General. * * * To obtain lower transportation costs or more expeditious service, small-lot shipments may be held for as many as five workdays (or longer if advantageous) for consolidation with other shipments to the same destination, when there is a reasonable expectancy of accumulating truckload, carload, or other volume lots. * * *

(e) AFM 75-1, Ch. 5 (Negotiations with Commercial Carriers * * *), ¶80501 (b):

80501. General

* * * *

b. *Basis for Negotiating Adjustments to Rates, Charges or Governing Rules.* Negotiations for adjustments or modifications of commercial car-

riers' rates, charges or governing rules will be undertaken only after a determination has been made as to the unreasonableness, unjustness or otherwise apparent unlawfulness of effective rates, charges or rules. Substantive and relative data will be prepared and offered in justification thereof. Negotiations will not be conducted by attempting to play one carrier or mode of transportation against the other. In instances where carriers have the option of providing rates in some manner other than by the usual tariff publication, no attempt will be made to prescribe which of the authorized methods will be used.

6. The pertinent Department of Defense Directives are:

Department of Defense Directive No. 4500.9, January 6, 1956:

* * * *

SUBJECT General Transportation and Traffic Management Policies

* * * *

II. GENERAL

In the employment of its own transportation resources and in the procurement of commercial transportation, the Department of Defense will be guided by and pursue policies which will not contravene the National Transportation Policy enacted by Congress in the Transportation Act of 1940 and the Declaration of Policy by Congress to the Civil Aeronautics Authority, as contained in Section II of the Civil Aeronautics Act of 1938. These policies are cited in the attached enclosure for the guidance of all in connection with any reference thereto in Department of De-

fense transportation and traffic management policies.

III. POLICIES

A. The economic resources of the Department of Defense inherent in its large procurement of commercial transportation will not be employed in such a manner as will adversely affect the economic well-being of the commercial transportation industry.

Department of Defense Instruction No. 4520.3, February 2, 1956:

SUBJECT Transportation Freight Rate Negotiation and Litigation (Domestic)

* * * *

II. POLICIES

A. *Bases for Negotiating Adjustments to Rates, Charges or Governing Rules.*

Negotiations for adjustments or modifications of commercial carriers' rates, charges or governing rules will be undertaken only after a determination has been made as to the unreasonableness, unjustment or *otherwise apparent* unlawfulness of effective rates, charges or rules. Substantive and relative data will be prepared and offered in justification thereof. Negotiations will not be conducted by attempting to play one carrier or mode of transportation against the other. In instances where carriers have the option of providing rates in some manner other than by the usual tariff publication, the military departments will not prescribe which of the authorized methods will be used.

* * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 484661° 521